

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Sponsorship Identification Rules	)	MB Docket No. 08-90
And Embedded Advertising	)	

**COMMENTS OF FREE PRESS**

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## I. Introduction

Free Press respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking.<sup>1</sup> The Commission should strengthen and expand its sponsorship identification rules in an effort to bring greater transparency to the growing practices of product placement and product integration, also known as embedded advertising. These practices are deceptive and deleterious to the public service values required by law of video service providers of all types.

Nonetheless, more companies are resorting to embedded advertising because it is an increasingly effective method of reaching customers. According to Nielsen Media Research, more than 5,100 embedded ads appeared on network TV in 2007, a 13 percent increase from the previous year. Advertisers also spent \$2.9 million in product placements in TV and films in 2007, up 33.7 percent from the previous year.<sup>2</sup> Hundreds of advertising agencies specialize in placing embedded ads. Most film and TV studios now have departments devoted entirely to placing embedding ads into TV shows or films.<sup>3</sup>

The growth of embedded advertising goes against established Commission policy of transparency. Viewers watching their favorite TV programs do not know when an embedded ad appears unless they watch the fine print of closing credits at the end of each show. And the relationship between a sponsor and the embedded product is often unclear in those credits. This process simply does not work, and is inconsistent with the Commission's goals of ensuring that viewers are conspicuously informed of all sponsorship of the programming they consume. As a result, the public is being misled.

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<sup>1</sup> *Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90, Notice of Inquiry and Notice of Proposed Rulemaking, 23 FCC Rcd 10682 (2008) (*Embedded Ads NPRM*).

<sup>2</sup> *See, e.g.*, Writers Guild Comments at 7.

<sup>3</sup> Campaign for a Commercial-Free Childhood Comments at 3.

## II. Discussion

### A. More Prominent Disclosure of Embedded Advertising Should be Provided to Television Viewers

The Commission's current rules are not sufficient to address the growing use of embedded ads. The media landscape has changed the techniques advertisers are using to reach consumers. The rules must be amended to reflect the reality of current ad practices by demanding greater transparency on the use of product integration.

The 1934 Communications Act adopted sponsorship identification regulations in an effort to “protect the public’s right to know the identity of the sponsor when consideration has been provided in exchange for airing programming.”<sup>4</sup> Specifically, Section 317 requires broadcasters to “make sponsorship identification announcements in any programming for which consideration has been received,”<sup>5</sup> and to “exercise reasonable diligence” to acquire sponsorship information.<sup>6</sup> Section 507 establishes “a reporting scheme designed to ensure that broadcast licenses receive a notice of consideration that may have been provided or promised in exchange for the inclusion of matter in a program regardless of where in the production chain the exchange take places.”<sup>7</sup> In addition, Section 73.1212 and 76.1615 rules also mirror the language of Section 317 and state that the rules apply to commercial and noncommercial programming. Sponsorship disclosure is not needed if the identity of the sponsor is obvious.<sup>8</sup>

The growing use of embedded ads cannot be viewed independent of recent controversies surrounding the use of video news releases by the government and corporations to deceive the public. Free Press has been active in opposing the use of VNRs that do not clearly bear the

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<sup>4</sup> *Embedded Ads NPRM*, 23 FCC Rcd at 10684-85, para. 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (citing 47 U.S.C. § 317(c)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 10685, para. 5.

disclosure of their sponsors. Similarly, we have actively opposed the practice of broadcast payola. In these circumstances, the Commission has taken a principled stance and has opened investigations into offending practices. Similarly, the Commission must not here allow use of the airwaves to mislead the public; the Commission must demand greater transparency in what is presented to viewers. As the Chairman recently pronounced “A hallmark of whether something is reasonable is whether an operator is willing to disclose fully and exactly what they are doing.”<sup>9</sup>

Advertisers have adopted embedded advertising because it is an extremely effective way to reach customers. But effectiveness does not make advertising compliant with the public service responsibilities of broadcasters. The ads exploit the “emotional connection” a character or a program has with a viewer.<sup>10</sup> We support the Writers Guild’s contention that:

This connection is so coveted by certain television and advertising executives that ad agencies sometimes become intimately involved in the creative process by which television shows are written. As a result, the lines between entertainment content and advertising have at times become blurred beyond distinction.<sup>11</sup>

The comments of the Guild provide several telling examples of this practice that demonstrate unequivocally that it is contrary to the public interest. Television viewers should not be subjected to hidden and subliminal messages in ads. The public has an explicit right to know when someone is making an attempt to sell them a product.

We support the recommendation of the Writer’s Guild of America, West for simultaneous disclosure whenever an embedded ad appears in a program. As the Guild suggested, the disclosure should appear on a crawl on the bottom third of the TV screen with the

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<sup>9</sup> Statement of Chairman Kevin Martin, Senate Committee on Commerce, Science and Transportation Hearing, at 6, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-281690A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf) (April 22, 2008).

<sup>10</sup> Writers Guild Comments at 5.

<sup>11</sup> *Id.*

name of the embedded product featured in readable text.<sup>12</sup> This is the most transparent and fitting method of solving this problem. However, at the very least, the Commission should adopt the Commercial Alert recommendations that call for clear verbal and visual disclosures at the beginning of segments that an embedded ad appears as well as during the outset and end of the program that explains “the nature of the hidden advertisement.”<sup>13</sup>

## **B. Children Deserve Further Protection from Embedded Ads**

In addition to our primary recommendations concerning consumer disclosure, we support arguments in the record stipulating that current sponsorship identification rules for children’s programming must also be strengthened. First, the Commission should codify its rules and explicitly prohibit embedded ads on all children’s programming, enforcing the ban that currently exists. The commission should also take extra measures to expand the ban to popular primetime broadcast programs watched by children.

Since the passage of the 1934 Act, the Commission and lawmakers have expressed concern about the impact of advertising on children. In 1974, the Commission adopted regulation to safeguard children from excessive advertising. It adopted a policy that called for clear separation between children’s programming and advertisement.<sup>14</sup> When Congress passed the Children’s Television Act of 1990, it called on the Commission to adopt regulation that limited commercials on children’s programming to 10.5 minutes an hour on weekdays and 12 minutes on weekends.<sup>15</sup>

Yet, children are bombarded with advertising targeting them. Last year, more than \$17 billion was spent in advertising to children, a dramatic increase from the \$100 million spent just

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<sup>12</sup> *Id.* at 2.

<sup>13</sup> Commercial Alert Comments at 29.

<sup>14</sup> Children Media Policy Coalition Comments at 12.

<sup>15</sup> *Embedded Ads NPRM*, 23 FCC Rcd at 10687, para. 4-6.

25 years ago.<sup>16</sup> Several studies have proven that children are vulnerable to advertising. As the Campaign for a Commercial-Free Childhood (CCFC) has stressed, direct marketing to children is harmful and is a factor in the rise of childhood obesity as well as other health risks and social disorders.<sup>17</sup> One disturbing example noted by CCFC was a study that asked kids to choose between receiving a chocolate bar or a head of broccoli. It should come as no surprise that 78 percent of children selected the chocolate bar. But that figure changed once a sticker of the Sesame Street character, Elmo, was placed on the broccoli. Half of the children chose to pick the Elmo-labeled broccoli, demonstrating the effect persuasive power of advertising on children.<sup>18</sup>

The Commission should also extend the ban on the use of product integration to primetime programming watched by children. Children watch family-oriented programming with their parents and siblings. Parents should not have to worry about exposing their children to insidious advertising techniques. Yet family-oriented programming contains a significant number of embedded ads. *American Idol*, referred to by the CEO of NBC Universal as “the most impactful show in the history of television,”<sup>19</sup> featured more product placements than any other show on the small screen.<sup>20</sup> Even if the Commission passed rules calling for simultaneous disclosure, it would not protect children who are unable to understand their meaning. The Commission must extend the embedded ad ban on children’s programming to primetime, family-oriented programming watched by children.

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<sup>16</sup> Campaign for a Commercial-Free Childhood Comments at 7.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 11-12.

<sup>19</sup> Bill Carter, *For Fox’s Rivals, ‘American Idol’ Remains a ‘Schoolyard Bully’*, NEW YORK TIMES, available at <http://www.nytimes.com/2007/02/20/arts/television/20idol.html> (Feb. 20, 2007).

<sup>20</sup> Nate Anderson, *Product placement still huge as advertisers fight DVRs*, ARS TECHNICA, available at <http://arstechnica.com/news.ars/post/20080917-product-placement-still-huge-as-advertisers-fight-dvrs.html> (Sept. 17, 2008).

<sup>25</sup> National Media Providers Comments at 12-13.

### **C. The Commission Should Dismiss the Self-Serving Claims of Industry**

The broadcast and advertising industries oppose the strengthening of sponsorship identification rules, claiming that current regulations are sufficient. They also claim rules that call for instant disclosure could jeopardize advertiser-supported TV as well as efforts to experiment with new advertising techniques like product integration. They assert that competition from the various video delivery platforms, including the Internet, as well as the creation of Digital Video Recorders, has reduced the number of viewers watching commercials.<sup>25</sup>

These arguments are incorrect for several reasons. First, media consolidation and the elimination of the Financial and Syndication rules have reduced competition in independent programming airing on TV and cable stations.<sup>26</sup> Giant media companies like Viacom, NBC Universal, News Corp., and Disney not only own local TV stations, but they also own numerous cable channels and produce most of the programming that airs on their TV and cable outlets.

Second, claims by broadcasters that a simultaneous crawl would negatively disrupt the public's viewing experience fall short. Recent articles have reported that broadcasters are seeking to sell ad space on the lower part of the TV screen, the same location where the Guild has suggested a crawl should appear to disclose the use of any embedded ads.<sup>27</sup> In addition, the Writers Guild also provided several examples of broadcasters already using the bottom third of the screen to advertise upcoming programs on their stations or networks.<sup>28</sup>

We disagree with the assertion of the broadcast and advertising industries that FTC regulation would protect viewers from deceptive advertising. FTC regulation protects viewers

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<sup>26</sup> See, e.g., Mark Cooper and Derek Turner, *The Negative Effect of Concentration and Vertical Integration on Diversity and Quality in Video Entertainment*, Presented at the 35th Research Conference on Communication, Information and Internet Policy, Sept. 2007.

<sup>27</sup> See e.g. Michael Hoffa, *Commercial Crawl: TV Advertising in the DVR Age*, ASSOCIATED CONTENT, Available at [http://www.associatedcontent.com/article/803189/commercial\\_crawl\\_tv\\_advertising\\_in.html?cat=35](http://www.associatedcontent.com/article/803189/commercial_crawl_tv_advertising_in.html?cat=35) (June 4, 2008).

<sup>28</sup> Writers Guild Comments at 14-18.

from ads that make false claims. Embedded ads may mislead viewers into believing they are watching advertisement free programming, but they do not deceive the public by making false claims.

The broadcast and advertising industries also claim that strengthening sponsorship identification rules may violate their First Amendment rights. But embedded advertising is deceptive, and deceptive speech is not protected by the First Amendment.<sup>29</sup> The Commission and Congress have a long history of requiring transparency and disclosure by broadcasters without violating their First Amendment rights. Further, strengthening the sponsor identification rules does not violate the First Amendment and serves a government interest in getting rid of misleading ad practices that have hidden messages.<sup>30</sup>

#### **D. The Commission Should Expand the Rules to MVPDs and Film**

We urge the Commission to expand its sponsorship identification rules to apply to multichannel video programming distributors (MVPDs), as well as films that are re-broadcast on those outlets. The same standards ought to apply to broadcasters and MVPDs. Both should be required to simultaneously disclose the use of embedded ads, make an announcement at the beginning and end of the program that addresses the use of embedded ads and announce at the beginning of each segment after commercial break the use of embedded ads in the upcoming scenes.<sup>32</sup>

The Motion Picture Association of America (MPAA) supports the current exemption of theatrical films that air on TV from disclosing the use of embedded ads. The group claims the practice of product placements has not changed in “any significant manner” since the

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<sup>29</sup> *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

<sup>30</sup> See, e.g., Commercial Alert Comments at 24.

<sup>32</sup> Commercial Alert Comments at 28.



commission exempted theatrical films from its sponsorship identification rules 45 years ago.<sup>33</sup>

The group also said the industry was exempted due to the substantial “time lag” between a film’s release and when it aired on TV, making it unlikely for the practice of embedded advertising to develop.<sup>34</sup> It also added viewers are not harmed by the placement of ads in films once a movie is shown on TV.<sup>35</sup>

We disagree. The media landscape has dramatically changed since the Commission exempted theatrical films from its sponsorship identification rules. Multichannel Video Programming Distribution is now the dominant medium for the public to receive video services. Hundreds of channels now exist that did not exist in 1963. Dozens of cable channels are devoted to showing films on a regular basis. Popular movies have an unlimited shelf life. Furthermore, the Commission need not look further than the MPAA’s petition to allow for Selectable Output Control.<sup>36</sup> The motivation for this petition is clear: “Consumers would be able to order from the comfort of their homes movies that are recently released in theaters.”<sup>37</sup> Furthermore, MPAA’s claims ignore the increasingly prominent role of Direct-to-DVD Films.<sup>38</sup>

Advertisers are aggressively seeking to place embedded ads in theatrical movies. According to PQ Media, product placement in movies totaled \$885 million in 2006.<sup>39</sup> Films could air on MVPDs for decades to come with embedded ads for products that will still be sold in stores.

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<sup>33</sup> MPAA Comments at 3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2-3.

<sup>36</sup> *Petition for Expedited Special Relief: Petition for Waiver of 47 C.F.R. § 76.1903*, Motion Picture Association of America (filed May 9, 2008).

<sup>37</sup> *Id.* at 8.

<sup>38</sup> Merissa Marr, *Studios Have New Respect For Direct-to-DVD Films*, WALL STREET JOURNAL, available at [http://online.wsj.com/public/article/SB117703718080776503-uJHL3\\_e9D\\_SqOFFqRu4zi0zl4GA\\_20070520.html](http://online.wsj.com/public/article/SB117703718080776503-uJHL3_e9D_SqOFFqRu4zi0zl4GA_20070520.html) (April 20, 2007).

<sup>39</sup> Commercial Alert Comments at 26.

In fact, many credit the film E.T.: The Extra-Terrestrial, released in 1982, for creating the embedded ad business. In the film, the lovable alien had a craving to eat Reese's Pieces. Sales of the candy increased by 65 percent in the months following the film's release.<sup>40</sup> The film still airs on a regular basis on cable and satellite channels and is now being watched by a whole new generation of children. And nearly 30 years later, Reese's Pieces are still being sold. In fact, the Hershey's company features a timeline on its Web site on the history of Reese's Pieces that includes the following entry for 1982: "REESE'S PIECES candy makes its big screen debut as E.T.'s favorite candy in the movie E.T. THE EXTRA-TERRESTRIAL."<sup>41</sup>

The Commission must expand the disclosure requirements for films. Viewers should have the right to be informed if embedded ads are in the motion picture they are viewing. Furthermore, parents need to be provided with the information necessary to assess the appropriateness of programming for their children. We agree with Commercial Alert's recommendation for simultaneous disclosure of embedded ads as well as mandatory disclosures at the beginning and end of movies.

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<sup>40</sup> Dale Buss, *A Product-Placement Hall of Fame*, BUSINESSWEEK, Available at <http://www.businessweek.com/1998/25/b3583062.htm> (June 22, 1998).

<sup>41</sup> REESE'S PIECES candy – HERSHEY'S, at <http://www.hersheys.com/products/details/reesespieces.asp>.

### **III. Conclusion**

The Commission must protect viewers from the growing practice of embedded advertising. The current disclosure rules are ineffective in informing the public about the use of embedded ads on programs they are watching. The Commission should strengthen its sponsorship identification rules to require simultaneous disclosures by using a crawl to inform viewers when embedded ads are being used. At the very least, programmers must make a clear announcement at the beginning and end of each show, as well as the start of each segment that embedded ads appear.

The Commission should also explicitly ban the use of embedded ads on children programs, and the Commission should ban the use of embedded ads during popular primetime broadcast shows.

We also urge the Commission to extend its sponsorship identification rules to films, lifting the exemption that has allowed movies to use embedded ads without any disclosure requirements.

Respectfully submitted,

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